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No. 93-1674

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK and JOHN BORDEN,
Petitioners,

v.

SHARON KARIBIAN and MARK URBAN,
Respondents.

On Petition for Writ of *Certiorari* to the United States Court of Appeals for the Second Circuit

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF *CERTIORARI*

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") respectfully moves this Court for leave to file the accompanying brief as *amicus curiae*. In support of this motion, the Chamber shows as follows:

1. This motion is necessitated by the refusal of counsel for Respondent, Sharon Karibian, to consent to the filing of a brief by the Chamber. Counsel for Respondent, Mark Urban, and counsel for Petitioners, Columbia University and John Borden, have consented to the filing of this brief. Those letters of consent are being filed simultaneously with this motion and brief.

2. The Chamber is the largest federation of business companies and associations in the world. With substan-

tial membership in each of the 50 states, the Chamber represents approximately 220,000 businesses and organizations and serves as the principal voice of the American business community.

3. An important function of the Chamber is to represent the interests of its members in significant employment matters before this Court, the lower courts, the United States Congress, the Executive Branch and the independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance those interests by filing briefs in a wide spectrum of employment litigation. E.g., *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57 (1986); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Hazen Paper Co. v. Biggins*, —— U.S. ——, 113 S. Ct. 1701 (1993); and *Landgraf v. USI Film Products, Bonar Packaging, Inc. and Quantum Chemical Corporation*; *Rivers v. Roadway Express, Inc.*, —— U.S. ——, 114 S. Ct. 1522 (1994).

4. The Chamber's members have a fundamental interest in the issue presented by this case. As employers, Chamber members are vitally concerned with their responsibilities and duties under Title VII, and are dedicated to eliminating sex discrimination in the workplace. The decision of the court of appeals in this case, however, constitutes an unwarranted extension of Title VII to areas beyond the employer's control. By imposing liability on an employer for the purely personal conduct of a supervisor—of which the employer had no knowledge, and which was directly contrary to the employer's express policies—the court of appeals placed an impossible burden on employers. It has, in effect, created a standard of "strict liability" in sexual harassment cases from which employers, despite aggressive sexual harassment policies, cannot escape.

5. In response to this Court's decision in *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57 (1986), the Chamber, and many of its members, have established extensive

policies and programs to deal with sexual harassment in the workplace. These policies and programs are designed to quickly resolve complaints of sexual harassment without the necessity of lengthy administrative and court proceedings. The Second Circuit's rule eliminates any inducement for employers to establish productive sexual harassment policies for their workforces and is contrary to well-settled principles established by this Court. Thus, Chamber members have a fundamental interest in ensuring that the petition for writ of *certiorari* be granted and the decision of the U.S. Court of Appeals for the Second Circuit reversed.

WHEREFORE, the Chamber respectfully requests that it be granted leave to file the accompanying brief *amicus curiae* in support of the Petitioners, Columbia University and John Borden.

Respectfully submitted,

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QUESTION PRESENTED

Whether an employer is strictly liable pursuant to Title VII of the Civil Rights Act of 1964 for actions that allegedly arose from a supervisor's sexual harassment of an employee where the employer has a policy specifically against sexual harassment and effective procedures available to complainants that provide prompt remedial action.

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR WRIT OF *CERTIORARI*

INTEREST OF THE *AMICUS CURIAE*

The interests of the Chamber of Commerce of the United States of America (the "Chamber") in this matter are set forth in the accompanying Motion for Leave to File Brief as *Amicus Curiae*.

STATEMENT OF THE CASE

Respondent, Sharon Karibian, was a part-time adult student at Columbia University's School of General Studies, and a part-time clerical worker in 1986 at "Telefund at Columbia." The Telefund program was a fundraising program operated under the aegis of Columbia Univer-

sity's Office of University Development and Alumni Relations ("UDAR"). The program was administered by an outside consultant, Philanthropy Management, Inc. ("PMI"). During the course of her employment, Karibian progressed from clerical worker to Project Director, which was the highest position at the Telefund program. Each promotion, and accompanying raise, was based solely on merit.

In the Spring of 1987, Karibian became involved in a sexual relationship with Respondent, Mark Urban. Later that year, in September 1987, Urban accepted a job with UDAR at Columbia University. In the Fall of 1989, when Karibian was promoted to Project Director of the Telefund program, Urban became her direct supervisor. Karibian's relationship with Urban also ended in 1989.

Columbia University has an established mechanism for dealing with sexual harassment. Columbia publishes a bulletin entitled "Protection Against Sexual Harassment." This bulletin expressly states that the "University prohibits sexual harassment of any member of the Columbia community," and also describes the remedies provided by the University if allegations of sexual harassment arise. An individual who believes that he or she is being sexually harassed has several options with which to pursue the allegations. The individual can confer with a member of the University Panel on Sexual Harassment or discuss the problem with the University's Office of Equal Opportunity and Affirmative Action ("EOAA"). Both of these processes are entirely confidential. A party alleging sexual harassment also has the option of filing a grievance under the University's grievance procedure. This procedure is not confidential and sets in motion an investigation and other steps which may lead to remedial action against the alleged harasser.

In 1988, Karibian consulted with one of the members of the Sexual Harassment Panel and also with an employee at the EOAA to discuss allegations that she was

being sexually harassed by Urban. At the conclusion of these discussions, Karibian specifically requested that there be no investigation of the allegations.

On January 30, 1990, Karibian complained to the Director of Development Services at UDAR that Urban was undermining her in her job as Project Director of Telefund since her sexual relationship with Urban had ended. As a result of this complaint, Columbia University promptly removed Urban as Karibian's supervisor and commenced an investigation into her sexual harassment claims. During the course of the investigation, Urban was asked to, and did, resign.

In 1990, Karibian filed suit against Columbia University, John Borden [1] and Mark Urban in the U.S. District Court for the Southern District of New York alleging a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* The district court awarded summary judgment in favor of Columbia University, holding that Karibian had not established a case of sexual harassment based on either the *quid pro quo* theory or the hostile environment theory of sexual harassment.[2]

On appeal, the U.S. Court of Appeals for the Second Circuit reversed the district court's judgment and ordered the case remanded for further proceedings. The court of appeals held that when a complainant "submits" to a supervisor's alleged sexual advances, the employer is strictly liable under the *quid pro quo* theory for the con-

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[1] John Borden has been Deputy Vice President of UDAR since April 1988, and, as such, was Urban's supervisor.

[2] Sexual harassment in the workplace falls into two categories. First, *"quid pro quo"* harassment where a supervisor demands sexual consideration in exchange for job benefits. B. Lindemann and D. Kadue, *Sexual Harassment in Employment Law*, 129 (1992). Second, "hostile environment" harassment where conduct is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Systems, Inc.*, —— U.S. ——, 114 S. Ct. 367 (1993).

duct regardless of whether the plaintiff proved economic or job related loss. In addition, the court held that the employer is also strictly liable for a supervisor's alleged conduct under the "hostile environment" theory regardless of the absence of notice or the reasonableness of an employer's sexual harassment policy and complaint procedure. Columbia University now petitions this Court seeking reversal of the decision of the court of appeals.

INTRODUCTION

This brief focuses on the single issue of employer liability for the actions of supervisors in sexual harassment cases. There is no dispute among the parties that employers have an obligation to maintain a workforce free from sexual harassment. The key question presented by this case is whether an employer is insulated from liability when it makes substantial effort, by establishing a comprehensive policy and procedure, to deter sexual harassment in the workplace. Without resolution of this important question, employers will have no incentive to implement these policies which serve the preventive purpose of Title VII.

I. THE PETITION FOR *CERTIORARI* SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT'S STRICT LIABILITY STANDARD IS CONTRARY TO THIS COURT'S RULING IN *MERITOR SAVINGS BANK FSB v. VINSON.*

This Court has previously held that, in sexual harassment cases, employers are not automatically liable under Title VII of the Civil Rights Act of 1964 for harassment of employees by their supervisors without regard to the circumstances of a particular case. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 73 (1986). Instead, the Court held that Congress intended the courts to look to agency principles for guidance with regard to employer liability for sexual harassment of employees by their superiors. *Vinson* at 72. By applying agency principles,

the Court demonstrated an intent to "place some limits on the acts of employees for which employers under Title VII are to be held responsible." *Id.* More specifically, the Court determined that the existence of a policy prohibiting sexual harassment in the workplace, and a procedure to implement such a policy was "plainly relevant" to a determination of employer liability for a supervisor's behavior. *Id.*

The plaintiff in *Vinson* was employed by a bank for approximately four years. During the course of her employment, she received several merit based promotions, but was eventually discharged for taking sick leave for an indefinite period of time. The plaintiff then brought an action against the bank, and her supervisor at the bank, claiming that during her employment at the bank she had been subject to sexual harassment by her supervisor in violation of Title VII of the Civil Rights Act of 1964. In addition to recognizing the "hostile environment" theory of harassment, this Court expressly noted that employers are not strictly liable for sexual harassment of employees by their supervisors.

One factor critical to the Court's decision in *Vinson*, was the employer's lack of a specific sexual harassment policy and procedures to implement a policy. The Court found that the bank's general nondiscrimination policy did "not address sexual harassment in particular, and thus did not alert employees to their employer's interest in correcting that form of discrimination." *Vinson* at 72-73. Moreover, the Court deemed the bank's grievance procedure inadequate because employees had no alternative to voice charges of discrimination but to complain directly to their supervisors.

The instant case presents this Court with an entirely different situation than in *Vinson*. Columbia University, unlike Meritor Savings Bank, has a multi-faceted sexual harassment policy that addresses all aspects of a sexual harassment allegation. In addition to a blanket prohibi-

tion on sexual harassment, the university provides individuals with both confidential, and more formal investigatory, procedures with which to pursue complaints of harassment. For example, an individual can select from options such as counseling, mediation, investigation, and a formal grievance procedure to resolve allegations of harassment. The university also has a twenty-six member panel that is available to complainants, and an Office of Equal Opportunity and Affirmative Action. The Second Circuit simply ignored the existence of this comprehensive remedial scheme and created a strict liability standard for employers that is contrary to this Court's ruling in *Vinson*.[3]

Furthermore, the Second Circuit's decision is at odds with the decisions of other circuits, which have recognized that prompt remedial action—combined with a formal anti-harassment policy—can insulate an employer from liability in sexual harassment cases.[4] For example, in *Reed v. Delta Air Lines, Inc.*, No. 93-5031, 1994 U.S. App. LEXIS 3485 (6th Cir. 1994) (*per curiam*), the Sixth Circuit rejected a strict liability standard in cases where supervisors sexually harass employees. The plaintiff in *Reed*, a reservation desk operator with Delta, sued the company under the Tennessee Human Rights Act[5] alleging that her supervisor had refused to recommend

[3] The Chamber agrees with petitioner that the analysis of whether an employer is liable for alleged supervisor harassment, which depends on agency principles, is applicable under both the hostile environment and *quid pro quo* theories of sexual harassment. *See* Petition for Writ of *Certiorari* at 10-12.

[4] As Petitioners note, the Second Circuit's decision is in conflict with the decisions of other federal courts that have addressed the issue of employer liability for the actions of supervisors in hostile environment and *quid pro quo* sexual harassment cases. *See* Petition for Writ of *Certiorari* at 10-14.

[5] The standard of employer liability in sexual harassment cases is the same under § 4-21-401 of the Tennessee Human Rights Act and § 2000e-2(a)(1) of Title VII of the Civil Rights Act of 1964.

her for a flight attendant's position unless she had sexual intercourse with him. The court held that Delta was not liable for the supervisor's alleged sexual harassment because the company had taken immediate and effective remedial action by firing the supervisor as soon as Delta had notice of the wrongdoing. Unlike the Second Circuit, the Sixth Circuit adopted a standard of liability that credited the employer for responding adequately and effectively to allegations of sexual harassment.

Similarly, the Fifth Circuit has twice held that employers are not liable when they take prompt and appropriate remedial action in response to allegations of sexual harassment of an employee by a superior. *Carmon v. Lubrizol Corporation*, No. 92-2964, 1994 U.S. App. LEXIS 5956 (5th Cir. 1994), and *Dornhecker v. Malibu Grand Prix Corp.*, 828 F.2d 307 (5th Cir. 1987). Most recently, in *Carmon*, the plaintiff complained to her employer on two occasions that she had been subject to a hostile working environment because her supervisor used vulgar language and asked her questions about her sexual activities. The court held that the company could not be held liable for the supervisor's actions because it took immediate, and suitable, remedial action in response to the allegations. In particular, the court noted that the company interviewed the plaintiff, interviewed six witnesses, reprimanded and transferred the supervisor, and distributed a memorandum on the ill effects of sexual harassment in the workplace. These actions, the court determined, evidenced a strong intent to free the workplace of the alleged harassment and divested the company of liability.

Similarly, in *Dornhecker*, an employer's prompt response to an employee's claim of sexual harassment shielded the employer from liability under Title VII. There, the plaintiff brought a Title VII action alleging that one of the company's contract consultants created a hostile work environment during an out-of-town company meeting. The plaintiff brought her allegations directly to the president

of the company who immediately eliminated contact between the plaintiff and the consultant. According to the Fifth Circuit, then, the employer's prompt remedial action was the key factor in determining employer liability for sexual harassment of the employee by supervisor.

Thus, evidence that the employer has established a strong policy forbidding sexual harassment, has communicated this policy to employees, and has disciplined those who disregard the policy, should divest the employer of liability for the unauthorized conduct of a supervisor. The Second Circuit has, however, ignored these mitigating factors—placing it in conflict with other circuits—and developed a strict liability standard that demands review by this Court.

II. THE SECOND CIRCUIT'S STRICT LIABILITY STANDARD IMPEDES THE DEVELOPMENT OF SEXUAL HARASSMENT POLICIES THAT WORK TO THE BENEFIT OF EMPLOYERS AND EMPLOYEES.

Columbia University's petition should be granted because the Second Circuit's strict liability standard inhibits the development of policies designed to combat sexual harassment in the workplace. A central purpose of Title VII is to prevent sexual harassment from permeating the workplace. Equal Employment Opportunity Commission Guidance on Current Sexual Harassment Issues, 8 Fair Empl. Prac. Manual (BNA) 405:6699 (Mar. 19, 1990). Employers have met this goal by implementing comprehensive sexual harassment policies and procedures. These policies not only serve Title VII's directive, but offer prompt remedial relief to the complainants of the alleged harassment.

The Chamber urges this Court to credit the employer community for a substantial effort to eradicate sexual harassment in the workplace through the implementation of sexual harassment programs. While individual policies

may differ, the Chamber, and its members, have generally adopted programs containing the following four elements:

- a written policy provided to all employees stating that sexual harassment of any kind will not be tolerated in the workplace;

- internal procedures for dealing with sexual harassment complaints, quickly, fairly, and thoroughly. These procedures generally give employees alternative avenues for filing their complaints so that they have the option of complaining to a man or woman, and are not forced to complain to their immediate supervisor who may be part of the problem;

- training programs so that all employees understand what constitutes sexual harassment, the company's policy and how to file a complaint. Supervisors are trained on how to handle complaints; and

- prompt investigations of all complaints. Those found to have engaged in sexual harassment are subject to discipline in a manner consistent with the severity of the violation. The resolution of the matter is then fully explained to the complainant.[6]

The Second Circuit's strict liability standard undermines the effectiveness of a comprehensive sexual harassment policy like the one described above. First, the Second Circuit's decision discourages employers from assuming the expense and administrative burden of implementing such a procedure. For larger companies, the development of a sexual harassment program involves considerable time on the part of the personnel department and often the general counsel's office. For a small business, with a

[6] The Chamber acknowledges that some employers may have adopted inadequate sexual harassment policies. *See Vinson* at 73. (Employer's policy held inadequate because employee could only complain to direct supervisor who was the perpetrator of the alleged harassment). The Chamber is simply encouraging this Court to recognize that the existence of a policy and procedure is plainly relevant to a determination of employer liability in sexual harassment cases.

modest or non-existent human resource or legal department, outside consultants must be hired to design a policy. In both instances, employers spend considerable time and money implementing a comprehensive sexual harassment policy. By ignoring the existence of sexual harassment procedures when considering employer liability for the actions of supervisors, the Second Circuit has obliterated any incentive employers have to absorb the expense of these programs.

Second, the court of appeals decision has the effect of prolonging the investigation—and more importantly, the final resolution—of a sexual harassment allegation. A sexual harassment policy places the burden on the employer to quickly investigate any allegation of harassment, to separate the complainant from the alleged harasser, to interview witnesses, and to resolve the matter before it has a negative effect on the rest of the workforce. Without such a policy, employers will have less of an incentive to concentrate staff time on the completion of an investigation until formal charges are brought or litigation ensues.

Third, the Second Circuit's strict liability standard discourages employees from protecting themselves in the event that sexual harassment occurs. Most sexual harassment policies contain a mechanism through which employees can pursue their complaint. These type of procedures empower an employee to protect himself or herself against harassment. Employees need not continue to be victimized by supervisors or co-workers. If the Second Circuit's strict liability standard is not reviewed by this Court—and employers cease to develop harassment policies—employees will lose important avenues for pursuing their complaints.

Finally, the existence of in-house sexual harassment procedures encourages private resolution of disputes, and eliminates the growing burden that sexual harassment cases place on the federal agencies and the judiciary.

Title VII specifically requires the Equal Employment Opportunity Commission (EEOC) to "eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b). In addition, the Civil Rights Act of 1991 favors the private resolution of disputes, including the use of mediation, factfinding, or negotiations. Pub. L. No. 102-166, 105 Stat. 1981. The Second Circuit's decision clearly disregards this statutory language because it inhibits an employer's incentive to adopt resolution mechanisms as part of a sexual harassment policy and program.

Moreover, by discouraging alternative means of resolving disputes, the court's decision increases the burden on the EEOC as the arbiter of sexual harassment disputes. Recent information from the EEOC indicates that there has been a substantial increase in the number of sexual harassment charges filed with the agency. In 1993, 8.3% of all charges filed with the agency contained the issue of sexual harassment.[7] This represents a 28.7% increase over the number of charges filed in 1992 containing sexual harassment allegations.[8] The Second Circuit's decision simply ignores the fact that sexual harassment policies and programs would quickly resolve complaints of harassment and reduce the burden these cases place on the federal agencies and the judiciary.

Thus, by imposing liability on an employer for the purely personal conduct of a supervisor, which was directly contrary to the employer's express policy, the Second Circuit has placed an impossible burden on employers. As Petitioner notes, a case-by-case analysis of whether an employer should be liable for the alleged sexual harassment of an employee by a superivsor is more consistent

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[7] U.S. Equal Employment Opportunity Commission News Release, January 12, 1994.

[8] *Id.*

with the purposes of Title VII than the strict liability standard adopted by the Second Circuit. Such a case-by-case analysis creates an inducement for employers to establish comprehensive sexual harassment policies that work to the benefit of employers and employees.

CONCLUSION

For the foregoing reasons, the Chamber urges the Court to grant the petition for writ of *certiorari*.

Respectfully submitted,

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